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No. 398

In the Supreme Court of the United States

OCTOBER TERM, 1944

ESTATE OF E. R. KROGER, DECEASED, CHESTER F.  
KROGER, IRVING W. PETERSHOLD, HUGHES HOMAN  
AND THE PROVIDENT SAVINGS BANK AND TRUST  
COMPANY, EXECUTORS, PETITIONERS

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH  
CIRCUIT

WRIT FOR THE REMOVAL OF RECORDS



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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 998

ESTATE OF B. H. KROGER, DECEASED, CHESTER F.  
KROGER, IRVING W. PETTENGILL, RUDOLF HOMAN  
AND THE PROVIDENT SAVINGS BANK AND TRUST  
COMPANY, EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH  
CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## OPINIONS BELOW

The memorandum opinion of the Tax Court of the United States (R. 64-86), entered August 17, 1943, is not reported. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 250-263) is reported in 145 F. 2d 901.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 4, 1944 (R. 249). The

petition for a writ of certiorari was filed on February 28, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether the court below erred in sustaining the Tax Court's finding ~~found~~ that transfers in trust, made by the decedent in 1928, were made in contemplation of his death within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. If so, whether the value of the corpora of these trusts at the date of the decedent's death is includible in his gross estate or whether there should be excluded therefrom the value on the date of the transfer of the reserved right to the income therefrom.

#### STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

\* \* \* \* \*

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of \* \* \* his death, except in case of a bona fide sale for an adequate

and full consideration in money or money's worth. \* \* \* <sup>1</sup>

#### STATEMENT

The facts as found by the Tax Court (R. 65-74) and restated in the opinion of the Circuit Court of Appeals (R. 252-258) may be summarized as follows:

In 1927, the decedent, B. H. Kroger, a resident of Cincinnati, Ohio, who was born in 1860, sold his stock in the Kroger Grocery and Baking Company for \$24,397,000 (R. 65-66). Shortly thereafter, he made outright gifts of \$1,000,000 cash or its equivalent to each of his children by his first wife who had died in 1899 (R. 66-68), and, on February 13, 1928, set up two trusts, one for \$2,000,000 and the other for \$10,000,000, in favor of his children and their issue. The decedent retained the income therefrom for his life, but the transfers were otherwise absolute. (R. 68-69.) At the time, the decedent (then 68 years of age) planned to remarry, but did not want his intended wife to share with his children in the bulk of his estate at his death. Consequently, he proposed to execute a prenuptial agreement to accomplish his purpose, but was dissuaded from so doing by one of his sons and persuaded instead to create the

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<sup>1</sup> This section was amended, but in particulars not material here, by Section 803 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680.



irrevocable trusts in question. (R. 69-70.) On March 3, 1928, he entered into the contemplated marriage (R. 71), and on August 4, 1928, executed his last will and testament, making due provision for his wife, and providing that the rest and residue of his estate should go to his children and their issue (R. 72-73). The decedent died on July 20, 1938, of heart failure (R. 73-74).

The Tax Court found that the creation of the two trusts on February 13, 1928, and the contemporaneous transfer of \$12,000,000 to the trustees were for the purpose of barring his prospective wife, should she survive him, from any statutory rights in the transferred property, and that these transfers were made in contemplation of his death (R. 74). Accordingly, the Tax Court sustained the Commissioner's deficiency determination to the extent that it was based upon the inclusion of the value of the corpora of these trusts at the decedent's death in his gross estate (R. 86), and determined a deficiency in estate taxes in the sum of \$8,647,700.89 (R. 87).

The court below affirmed the decision of the Tax Court (R. 263).

#### ARGUMENT

1. The petitioners' contention that the decision of the Court below is in conflict with the decisions of this Court in *United States v. Wells*, 283 U. S. 102, and *Colorado Bank v. Commissioner*, 305 U. S. 23, is without merit. Both cases hold that

whether a transfer is made in contemplation of death depends upon the decedent's dominant motive.<sup>2</sup> The court below recognized that this was the controlling principle (R. 252), as did the Tax Court (R. 78), and both courts, we submit, correctly applied that principle to the facts in this case.

The taxpayer has the burden of proof and hence must show that a positive life motive actuated the transaction and that "contemplation of death" formed no substantial part of the decedent's motivating purpose. *McCaughn v. Real Estate Co.*, 297 U. S. 606; *First Trust & De-*

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<sup>2</sup> In the *Colorado Bank* case, the Board of Tax Appeals had found that the purpose which actuated the decedent in making the transfer there in question (under which he had retained no right to income) was to free himself to speculate on the stock market for the rest of his life without fear that the loss of his fortune would leave nothing for his daughter and her children at his death. This Court agreed with the Board's conclusion that a transfer so motivated might properly be said not to have been made in contemplation of his death within the meaning of the statute. It was in this situation that the Court said (p. 27) that "the mere purpose to make provision for children after a donor's death is not enough *conclusively* to establish that action to that end was 'in contemplation of death'." (Italics supplied.) This Court did not say that the transfer would not have been within the statute if the purpose to make provision for the objects of the decedent's bounty at or after death, or to anticipate such provision, had been an inducing motive, as the Tax Court has found it to be in this case, in making it. Cf. *City Bank Farmers Trust Co. v. McGowan*, No. 294, decided by this Court January 29, 1945; and see *Igleheart v. Commissioner*, 77 F. 2d 704 (C. C. A. 5th).

*posit Co. v. Shaughnessy*, 134 F. 2d 940, 941-942 (C. C. A. 2d), certiorari denied, 320 U. S. 744. In this case, the sole motive actuating the decedent in making the transfers was found by the Tax Court to have been the purpose to prevent his intended wife from sharing in the transferred property with his children at his death (R. 74). Since this finding was based solely on the petitioners' evidence, they themselves established what is manifestly not a life but a death purpose as the motivating factor in making the transfer.

2. Likewise without merit is the petitioner's alternative contention that the value of the reserved right to the income on the date of the transfers is to be deducted from the value of the corpora of the trusts on the date of death. The statute is plainly to the contrary as are the decisions interpreting it. See *Milliken v. United States*, 283 U. S. 15, 23; *Chase Nat. Bank v. United States*, 278 U. S. 327, 337; *Heiner v. Donnan*, 285 U. S. 312, 327; *Helvering v. Hallock*, 309 U. S. 106, 111; *Central Hanover Bank Co. v. Kelly*, 319 U. S. 94, 98; *Fidelity-Philadelphia Trust Co. v. Rothensies*, No. 263, decided by this Court February 5, 1945; *Igleheart v. Commissioner*, 77 F. 2d 704, 711 (C. C. A. 5th); *Liebmann v. Hassett*, 50 F. Supp. 537 (Mass.).

## CONCLUSION

There is no conflict on either point and no important question presented which requires this Court's consideration. Furthermore, the court below has correctly construed both of the provisions of the statute here in question. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MARCH 1945.